

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE May 27, 1982

SUBJECT Lead and Barite Tailings Piles on the Big River

FROM Jane B. Werholtz
Office of Regional CounselTO Timothy L. Amsden
Director, Special Projects*Recoup expenses
@ Damage Site by
EOE.**Big River Monie
MAD 981126899**17.8**Pine Ford Proj.
5-27-82*

Your memo of April 27, 1982 poses a possible scenario and question regarding the lead and barite tailing piles on the Big River. The question is: can Superfund recoup actions be used to collect expenses incurred by the federal government, specifically the U.S. Army Corps of Engineers, from other than Superfund monies. First, please note that the question of whether lead and barite tailings fall within the scope of Superfund is a preliminary question which should be asked and answered. However, the scenario you provide assumes that the site is fundable under Superfund.

As to the specific question you raise, the law is not clear. Section 107(a) states that a person is liable for "all costs of removal or remedial action incurred by the United States Government or a state, not inconsistent with the National Contingency Plan" notwithstanding any other provision or rule of law. This language is very strong and suggests an affirmative answer to your question. However, a review of the legislative and political history of CERCLA suggests that Section 107, the liability provision was not intended to create a federal common law for hazardous waste cleanup. Instead, the strict liability provision of Section 107 was struck as a political compromise. Strict liability was accepted if the authority for its application was limited by the CERCLA legislation (Section 104) to the fund. Furthering this argument is one which suggests that Section 107 is closely tied to Section 104, response authorities, in that Section 107 references costs for "removal or remedial action," terms specifically defined by CERCLA. The argument would be that the strict liability provisions of Section 107 could only be used when response actions taken under Section 104 were utilized. As you are aware, Section 104 and E.O. 12316 place certain limitations on response authority which might prevent Corps cleanup.

From a historical perspective, this agency did advise people prior to CERCLA authorization (when only RCRA money was available) that the agency would use 107 authority to pursue recoupment of cleanup costs. However, that "threat" was never implemented so the issue has not been legally contested and resolved.

I have discussed this issue with Dan Berry of the Office of Regional Counsel. Berry concurs with the conclusion that Section 107 may arguably be used as a legal foundation for cost recovery but there is no clear guarantee that the Corps of Engineers will be successful in recouping expenses.

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